

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

IN RE:

NORMAN HUGH SMITH

Debtor.

Case No. 10-81240

NORMAN HUGH SMITH

Plaintiff,

v.

CITIMORTGAGE, INC.

Defendant.

Adv. No. 10-9104

**CITIMORTGAGE'S MOTION TO DISMISS PLAINTIFF'S AMENDED VERIFIED
COMPLAINT**

NOW COMES Defendant CitiMortgage, Inc. ("CitiMortgage"), pursuant to Rules 12(b)(6) and (7) of the Federal Rules of Civil Procedure, made applicable to this adversary proceeding through Rule 7012 of the Federal Rules of Bankruptcy Procedure, and respectfully moves this Court for an Order dismissing Plaintiff's Amended Verified Complaint with prejudice. As initially raised in CitiMortgage's Answer, and as explained in further detail in the accompanying brief, the grounds for this Motion are as follows:

1. Plaintiff is barred from challenging the secured status or changing the treatment of CitiMortgage's claim under the doctrine of *res judicata*.
2. CitiMortgage's lien attached prior to the petition date.
3. Plaintiff lacks standing to challenge the alleged transfer as a preference.
4. Plaintiff has failed to join a necessary party.

WHEREFORE, CitiMortgage prays that the Court enter an order as follows:

- (1) Dismissing Plaintiff's Amended Verified Complaint with prejudice;
- (2) Declaring CitiMortgage's lien to be valid and enforceable;
- (3) Require the Debtor to pay CitiMortgage's secured claim in the underlying Chapter 13 case in accordance with the Bankruptcy Code;
- (4) That the Court afford the opportunity to argue this motion before the Court; and
- (5) That the Court grant CitiMortgage such other and further relief as the Court deems just and proper.

Respectfully submitted, this 28th day of February, 2011.

NELSON MULLINS RILEY & SCARBOROUGH, L.L.P.

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Attorneys for Defendant CitiMortgage, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2011 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send electronic notification of such to the following:

Michael D. West
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And I hereby certify that I have mailed the foregoing to the following non CM/ECF participants:

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